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Supreme Court, U.S.
FILED
FEB 19 1999
CLERK

No. 98-1089

In the

Supreme Court of the United States

October Term, 1998

HAMILTON AMUSEMENT CENTER t/a VIDEO EXPRESS, L.O.J., INC. t/a THE EMPORIUM, PINCO, INC. t/a CAMELOT BOOK STORE, and CRESCENDO BOOKS, INC. t/a CARNIVAL BOOKS,

Petitioners,

v.

PETER VERNIERO, Attorney General for the State of New Jersey and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Brief of the Respondents in Opposition

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QUESTIONS PRESENTED

1. Whether the New Jersey statute restricting signage at sexually-oriented businesses is a content-neutral regulation passing constitutional muster under City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).

2. Whether the Supreme Court of New Jersey committed plain error in affirming the determination of the New Jersey intermediate state-appellate court to expand the appellate record to include matters not brought to the attention of the trial court relevant to the factual basis derived from the record before the state legislature for a substantial governmental interest in the signage restrictions.

3. Whether, independent of commercial-speech analysis, New Jersey's statute restricting signage at sexually-oriented businesses is a content-neutral regulation that passes constitutional muster under City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).

4. Whether the alleged errors of the Supreme Court of New Jersey in its findings of fact sustaining respondents' burden of proof under commercial-speech analysis are material when, independent of that analysis, New Jersey's statute limiting signage at sexually-oriented businesses is a content-neutral regulation passing constitutional muster under City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).

5. Whether the phrase "identification sign" as interpreted by the Supreme Court of New Jersey is impermissibly vague in all its applications although the state courts gave it a limiting construction that persons of ordinary intelligence can understand.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Brief and Appendix of the Respondents in Opposition

STATUTES AND OTHER PROVISIONS INVOLVED

In addition to the statutes and other provisions whose text is quoted in the petition, the following provisions are involved: (1) New Jersey Statutes Annotated [hereinafter "N.J.S.A."] § 2C:33-12.2; (2) N.J.S.A. § 2C:34-7; (4) New Jersey Court Rule 2:10-5; and (4) New Jersey Court Rule 2:11-6. The text of these provisions is printed in the appendix at the end of this brief.

STATEMENT OF THE CASE

In 1995, the New Jersey Legislature enacted N.J.S.A. § 2C:34-7, regulating sexually-oriented businesses. Subsection a. of this statute requires dispersal of these businesses by prohibiting their location within 1000 feet of each other or within 1000 feet of certain protected entities. Subsection b. physically isolates these businesses by requiring surrounding perimeter buffers of plantings or other physical dividers impeding the view of the interior of the premises. Subsection c., at issue in this case, regulates signage by prohibiting the display of more than two exterior signs: an "identification sign" (no more than 40 square feet in size) and a sign giving notice that the premises are off limits to minors.

This statute was one part of a two-part legislative "package" regulating sexually-oriented businesses. (App. to Pet. A-21). The second part, a companion bill enacted one month earlier but introduced simultaneously and jointly considered by a legislative committee (see note 1 infra), was N.J.S.A. 2C:33-12.2. Subsection a. of this statute provides a definition of "sexually oriented business" -- the same definition applicable to N.J.S.A. § 2C:34-7. Subsection b. prohibits sexually-oriented businesses from offering patrons closed booths or screens to facilitate sexual activity. Subsection c. authorizes municipalities to determine restrictions on hours of operation.

Shortly after enactment, petitioners, each of which is a sexually-oriented business, commenced this action in a state trial court seeking declaratory and permanent injunctive relief against enforcement of the signage restrictions of N.J.S.A. § 2C:34-7c. Petitioners claimed that the restrictions violate their rights under the First and Fourteenth Amendments to the United States Constitution and corresponding provisions of the New Jersey Constitution. Petitioners also claimed that the phrase "identification sign" is constitutionally vague on its face.

In the trial court respondents introduced legislative history consisting of documents and a speech brought to the legislature's attention and directed to N.J.S.A. § 2C:34-7. Respondents did not introduce legislative history or documents and speeches directed to the companion statute, N.J.S.A. 2C:33-12.2. Respondents argued that the purpose of the signage restrictions was to improve traffic safety and diminish harm to minors. (App. to Pet. A-95 to A-97). The trial court held that the signage restrictions are content-based restrictions on speech that must fall under strict-scrutiny analysis. (App. to Pet. A-97 to A-99). The trial court also concluded that the statute's phrase "identification sign" is unconstitutionally vague. (App. to Pet. A-101). The trial court entered a permanent injunction prohibiting enforcement. (App. to Pet. A-81 to A-82).

Respondents appealed. In their appellate brief, respondents requested the intermediate state-appellate court to expand the appellate record to include legislative matters that respondents did not introduce in the trial court -- documents and speeches brought to the legislature's attention and directed to the companion statute, N.J.S.A. 2C:33-12.2. Respondents argued that expansion of the record would not prejudice petitioners, who were familiar with the new matters that respondents sought to introduce. The new matters had been introduced into the trial-court record in Chez Sez VIII, Inc. v. Poritz, 297 N.J.Super. 331, 688 A.2d 119 (App. Div.), certif. denied, 149 N.J. 409, 694 A.2d 194, cert. denied, --- U.S. ---, 118 S.Ct. 337, 139 L. Ed.2d 262 (1997), a case challenging the constitutionality of the companion statute, N.J.S.A. § 2C:33-12.2, and a case involving the same respondents, the same trial judge, the same lawyers, and some of the same petitioners, who had the opportunity to challenge or refute the accuracy of the new matters in the course of the Chez Sez proceeding. Respondents additionally argued that expansion was appropriate because petitioners relied upon the Chez Sez trial-court opinion in the court below. (Superior

Court of New Jersey, Appellate Division, "Brief on Behalf of Defendants-Appellants," filed August 2, 1996, p. 30 & n.6).

Respondents argued that the new matters that they sought to introduce were relevant to the legislative purpose of the signage restrictions. Respondents argued that in enacting N.J.S.A. 2C:34-7, the legislature was responding to concerns not only about traffic safety and harm to minors, but also about prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts infecting neighborhoods in which sexually-oriented businesses are located. Respondents argued that an additional purpose of N.J.S.A. § 2C:34-7 is physically and psychologically to isolate these businesses from the communities they harm (without otherwise interfering with their internal operation or First Amendment expression) through dispersal, perimeter buffers, and restrictions on the signage that announce their presence in the community. (Superior Court of New Jersey, Appellate Division, "Brief on Behalf of Defendants-Appellants," filed August 2, 1996, pp. 3, 20, 26, 31, 35).

Petitioners opposed respondents' application to expand the appellate record and argued that the new matters should "not be considered by this [intermediate state-appellate court] in determining whether [respondents] met [their] burden in the lower court of establishing" that the legislature regulated signage for the purpose of ameliorating adverse secondary effects. The sole reason advanced in support of their opposition to expansion was that "these documents were not provided to the court below as relevant legislative materials in this action." (Superior Court of New Jersey, Appellate Division, "Brief and Appendix on Behalf of Plaintiffs-Respondents," filed October 3, 1996, p. 17). Under the "arguendo" assumption that the intermediate state-appellate court might grant expansion, petitioners expended several pages of their brief discussing and challenging the applicability of the new matters. (Id. pp. 17 to 21).

The intermediate state-appellate court granted respondents' application and expanded the record to include documents and speeches directed to the companion statute, N.J.S.A. 2C:33-12.2. (App. to Pet. A-69 & n.3; A-70 & n.4). The court concluded that N.J.S.A. 2C:34-7c regulates only commercial speech and applied both commercial-speech analysis and the analysis of City of Renton v. Playtime Theatres, 475 U.S. 41 (1986). (App. to Pet. A-72, A-75). The court upheld N.J.S.A. 2C:34-7c and found that on the expanded legislative record, "objective lawmakers could reasonably conclude that sexually oriented businesses are associated with high crime rates and cause a deterioration in the quality of neighborhood life." (App. to Pet. A-75). "By isolating these businesses through dispersal, perimeter buffers, and signage restrictions," all included in N.J.S.A. 2C:34-7, "the legislature addressed these legitimate concerns while still allowing these businesses to advertise and operate." (App. to Pet. A-75).

As to the vagueness problem alleged by petitioners with respect to the phrase "identification sign," the court gave this phrase a limiting construction which, it concluded, eliminated vagueness. (App. to Pet. A-78 to A-79). The court held that "an identification sign may communicate not only the name of the establishment, but also the street number, operating hours and general nature of the establishment in order to identify the business." (App. to Pet. A-79). The court held that the statute does not prohibit "the posting of temporary political signs." (App. to Pet. A-78 n.6). The court reversed the trial court's judgment imposing restraints.

Petitioners sought review by the Supreme Court of New Jersey. Their "Petition for Certification" argued that the intermediate state-appellate court's limiting construction of the phrase "identification sign" did not cure the vagueness problem, and that the statute was infirm under the First Amendment. The Petition for Certification did not argue that the intermediate state-appellate court erred in expanding the

appellate record. Petitioners' "Reply Petition for Certification" (replying to respondents' brief in opposition to certification) argued that "[i]t was Respondents' duty . . . to prove by evidence before the trial court that the Government had a legitimate and significant interest in regulating adult business signage and that the signage restrictions were narrowly tailored to advance that interest" but failed to state whether this trial-court duty arose from state procedural law or First-Amendment principles. (Supreme Court of New Jersey, Reply Petition for Certification, filed May 9, 1997, pp. 6 to 7).

The Supreme Court of New Jersey granted petitioners' "Petition for Certification" and on July 21, 1998 issued its opinion and judgment in this matter affirming the judgment and reasoning of the intermediate state-appellate court. The opinion articulated a dual, simultaneous analysis under both commercial speech and Renton principles. (App. to Pet. A-12 to A-32). The Court found that the signage restrictions were part of an aggregate legislative enactment regulating sexually-oriented businesses for the purpose of improving traffic safety; limiting harm to minors; and reducing prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts. (App. to Pet. A-22). The Court sustained the limiting construction of the phrase "identification sign" and found that it was not facially vague. (App. to Pet. A-32 to A-40).

On July 31, 1998, petitioners filed a motion for reconsideration pursuant to New Jersey Court Rule 2:11-6. For the first time petitioners argued that it was error to expand the appeliate record to include legislative matters not brought to the trial court's attention. Petitioners claimed that the expansion denied them the ability to challenge or refute the accuracy or applicability of the legislative history of the companion statute, N.J.S.A. § 2C:33-12.2. Petitioners also claimed that expansion contravened First-Amendment principles requiring the government to articulate statutory

purpose and to adduce evidence of purpose in the trial court and not afterwards. (Supreme Court of New Jersey, "Brief and Appendix in Support of Motion for Reconsideration Pursuant to R. 2:11-6," filed July 31, 1998). On October 7, 1998, the Supreme Court of New Jersey denied petitioners' motion for reconsideration. (App. to Pet. A-1).

REASONS FOR DENYING THE WRIT

1. Petitioners' Disputes with the First-Amendment Analysis of the Opinion below Present Two Claims over Which this Court Lacks Jurisdiction And, in Any Event, Present No Questions That Warrant Granting the Writ.

Petitioners' first question presented is whether N.J.S.A. § 2C:34-7c is a content-based restriction on speech invalid under strict-scrutiny analysis. Petitioners fault the Supreme Court of New Jersey for analyzing this question under City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), and petitioners claim that Renton is "inapposite herein" (Pet. 9) because the City of Renton did not attempt to regulate the content of the speech of sexually-oriented businesses whereas the New Jersey statute regulates the content of petitioners' signage.

Petitioners are objecting only to a perceived (but not a real) misapplication of settled law on an issue that seldom arises. Petitioners point to no conflict among lower courts as to whether Renton is applicable to signage restrictions, including restrictions on content, for sexually-oriented businesses. Those few courts that have addressed this issue have uniformly applied Renton to uphold the restrictions when, although literally content-based, the restrictions may be justified without reference to content because they serve a purpose to ameliorate adverse secondary effects. (App. to Pet. A-29 to A-31).

There is no basis for drawing the distinction which, petitioners claim, renders Renton inapposite to signage content-restrictions. Contrary to petitioners' premise, the City of Renton regulated the content of speech in the sense that a business's promulgation of sexually-oriented speech was a predicate to the application of the City's restrictions on where the business could locate. Still, this Court applied content-neutral analysis because of the City's purpose to ameliorate adverse secondary effects. For the same reason, content-neutral analysis is appropriate for the signage restrictions in this case. The restrictions pertain only to signage and not to other advertising or First-Amendment expression.

Petitioners fault the finding of the Supreme Court of New Jersey that the signage restrictions were part of an aggregate legislative enactment regulating sexually-oriented businesses for the purpose of improving traffic safety; limiting harm to minors; and reducing prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts. (App. to Pet. A-22). But this Court does not normally grant the writ to review state-court findings of fact. There was sufficient evidence before the Supreme Court of New Jersey to make these findings. The legislative matters reviewed in the appeal demonstrated that the legislature was apprised that sexually-oriented businesses contribute to prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts. (App. to Pet. A-21 to A-22). Physically and psychologically isolating these businesses from the communities they harm and deterring anonymous on-premises sexual activity in closed booths (without otherwise interfering with the businesses' internal operation or First Amendment expression) through dispersal, perimeter buffers, and closed-booth and signage restrictions (all part of the aggregate legislative enactment) is a rational approach to ameliorating adverse secondary effects. (App. to Pet. A-24 to A-25, A-26).

Petitioners discuss a split of authority as to whether the legislative record must contain pre-enactment evidence of the legislature's intent to ameliorate adverse secondary effects in order for the legislation to be afforded intermediate scrutiny as content-neutral legislation; and as to whether, in the absence of pre-enactment evidence, the government may be afforded the opportunity in court to adduce evidence of adverse secondary effects and the legislation's ameliorative purpose. (Pet. 10 to 11). This split of authority is irrelevant to this case because the findings of the Supreme Court of New Jersey relied upon legislative pre-enactment evidence. (App. to Pet. A-22).

Petitioners' dispute with the findings of the Supreme Court of New Jersey is not that the Court went outside the legislative record. Petitioners' dispute is that the Court went outside the legislative matters presented to the trial court. Petitioners claim that the First Amendment restricted the Supreme Court of New Jersey to the trial-court record. (Pet. 14). Petitioners' second question presented asks whether the First Amendment requires that the findings of the Supreme Court of New Jersey be based upon the trial-court record, rather than upon the expanded appellate record.[1] This Court

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[1] The phrasing of petitioners' second question presented suggests that it may also ask whether matters brought to the legislature's attention in its consideration of the companion statute, N.J.S.A. § 2C:33-12.2, may be utilized to discern legislative intent in the signage restrictions of N.J.S.A. § 2C:34-7c (even if respondents had brought these matters and the companion statute to the attention of the trial court). This question is neither interesting nor important. Both statutes have a common legislative history, both were introduced as bills into the legislature within one week of each other, both proceeded simultaneously through the legislature, the sponsors engaged in cooperative efforts to obtain amendments to make both bills consistent with each other, both were reviewed on the same day in a single legislative committee hearing, both use the same definition of "sexually oriented business," and both regulate sexually-oriented businesses. (Superior Court of New Jersey, Appellate Division, "Brief on

lacks jurisdiction to resolve this question because the Supreme Court of New Jersey did not decide it; because petitioners did not timely ask that it be decided; and because an independent and adequate state-law ground supports the expansion.

New Jersey Court Rule 2:10-5 allows an appellate court, including the Supreme Court of New Jersey, to exercise "such original jurisdiction as is necessary to the complete determination of any matter on review." Expansion of the appellate record to consider legislative matters outside the trial-court record was an appropriate application of this Rule, which therefore provides an independent and adequate state-law ground for the expansion inasmuch as petitioners did not timely advise the Supreme Court of New Jersey (or the intermediate state-state-appellate court) that, and did not timely request the court to decide whether, expansion violated their First-Amendment rights.

Petitioners first claimed a First-Amendment violation arising from the expansion in their motion for reconsideration filed July 31, 1998, ten days after the Supreme Court of New Jersey issued its opinion in this matter. A motion for reconsideration pursuant to New Jersey Court Rule 2:11-6 is not favored under state law and is not an adequate method for preserving claims not previously made in the course of state appellate proceedings. A motion for reconsideration does not compel the appellate court to resolve issues not previously raised; at most, the matter lies in the discretion of the court, which normally displays its interest in the motion by issuing

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Behalf of Defendants-Appellants," dated August 2, 1996, pp. 29 to 32). Discernment of legislative purpose often requires consideration of statutes touching upon similar subject matters and having far less inter-connection than these statutes. That a sponsor or interested citizen may have spoken about or submitted materials on behalf of only one of these statutes hardly foreclosed members of the legislature from considering the speech or the materials submitted in the context of both statutes. Nothing in the First Amendment forecloses joint consideration.

a request for an answer from the movant's opponent (in the absence of which the Rule does not allow the opponent to answer). The Supreme Court of New Jersey denied petitioners' motion for reconsideration (App. to Pet. A-1) without requesting an answer from respondents.

The second question presented raises an unusual, virtually unique fact pattern unlikely to arise again. The second question presented lacks merit and importance. The First Amendment says nothing about state-court procedure in this context. State-court procedure is normally a matter of state law. As a matter of state law, the intermediate state-appellate court and the Supreme Court of New Jersey might have restricted respondents to the trial-court record, but nothing in the First Amendment impacted upon state-court procedure to foreclose the Supreme Court of New Jersey (or the intermediate state-appellate court) from expanding the appellate record to take judicial notice of legislative matters not brought to the trial court's attention. So long as that notice helped to sustain the content-neutrality of the statute under review, the First Amendment demanded nothing more.

Petitioners claim that expansion of the appellate record denied them "the ability to challenge or refute the accuracy or applicability of [the] legislative history" of the companion statute, N.J.S.A. § 2C:33-12.2. (Pet. 7). This claim lacks merit. Petitioners had this ability and expended several pages of their intermediate state-appellate court brief discussing and challenging the applicability of this legislative history. (Superior Court of New Jersey, Appellate Division, "Brief and Appendix on Behalf of Plaintiffs-Respondents," filed October 3, 1996, pages 17 to 21). Moreover, this legislative history was part of the trial-court record in Chez Sez VIII, Inc. v. Poritz, 297 N.J.Super. 331, 688 A.2d 119, certif. denied, 149 N.J. 409, 694 A.2d 194, cert. denied, --- U.S. ---, 118 S.Ct. 337, 139 L. Ed 2d 262 (1997), a case challenging the constitutionality of the companion statute,

N.J.S.A. § 2C:33-12.2, and a case involving the same defendants, the same lawyers, the same trial judge, and -- most importantly -- some of the same petitioners as this case, who had opportunity, ability and motivation to challenge or refute the accuracy of that history in the course of that proceeding.

The claim that expansion of the appellate record denied petitioners the ability to challenge or refute the accuracy or applicability of the legislative history of the companion statute, N.J.S.A. § 2C:33-12.2, raises notice due-process concerns rather than First-Amendment issues. This claim was not preserved in the state-court proceedings below since it too was first raised in petitioners' post-opinion motion for reconsideration filed July 31, 1998. Neither the intermediate state-appellate court nor the Supreme Court of New Jersey adjudicated this claim. Not having been decided below, not having been preserved below, and preempted by an independent and adequate state-law ground (the expansion authority afforded by New Jersey Court Rule 2:10-5), the claim is outside of this Court's jurisdiction.

Petitioners' third and fourth questions presented raise issues about the commercial-speech analysis of the Supreme Court of New Jersey.[2] Petitioners' arguments supporting these questions, like their Renton analysis, partially rests upon

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[2] In their commercial-speech argument, petitioners submit that N.J.S.A. § 2C:34-7c is not narrowly tailored because it imposes a state-wide solution for a problem that is essentially a local, municipal zoning problem. (Pet. 22 to 23). This argument, relevant to the Renton analysis as well, was properly rejected by the Supreme Court of New Jersey (App. to Pet. A-31 to A-32) and is easily dismissed with the observation that signage for sexually-oriented businesses is visible across municipal boundaries and thus harmful to adjacent municipalities that have no zoning control over it. Likewise, the deleterious effects of sexually-oriented businesses (and the signage that advertise and announce their presence) are often not restricted to a single municipality.

their mistaken claim -- over which this Court lacks jurisdiction -- that the First Amendment forecloses judicial notice by a state appellate court of matters not brought to the trial court's attention. (Pet. 20). But more broadly, petitioners discuss dissatisfaction with the commercial-speech doctrine expressed by members of this Court and commentators as well, some of whom have proposed abandonment of the doctrine. (Pet. 15 to 18). Petitioners urge that the writ be granted to afford general review of the doctrine.

Several cases percolating through the appellate process, including United Reporting Pub. Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998), cert. granted --- U.S. ---, 1999 WL 24679, 67 U.S.L.W. 3302, 67 U.S.L.W. 3342, 67 U.S.L.W. 3464, 67 U.S.L.W. 3468 (U.S. Jan. 25, 1999), and Greater New Orleans Broadcasting Ass'n v. U.S., 149 F.3d 334 (5th Cir. 1998), cert. granted --- U.S. ---, 1999 WL 13527, 67 U.S.L.W. 3191, 67 U.S.L.W. 3449, 67 U.S.L.W. 3456 (U.S. Jan. 15, 1999), will provide this Court appropriate opportunities to revise or abandon the commercial-speech doctrine. But this case is not an appropriate vehicle. The opinion of the Supreme Court of New Jersey carefully articulated a dual, simultaneous analysis under both commercial speech and Renton principles. (App. to Pet. A-12 to A-32). Unlike the commercial-speech doctrine, Renton is not under attack. On the contrary, commentators urging abolition of the commercial-speech doctrine argue that traditional analysis is adequate for resolution of commercial-speech issues (Pet. 17), and the analysis employed in Renton is traditional.

Respondents will prevail under the Renton analysis even if this Court were to grant the writ and revise the traditional commercial-speech analysis employed by the Supreme Court of New Jersey in the opinion below. Thus, revision of the commercial-speech doctrine as applied to this case would be

mere dicta irrelevant to the outcome. The writ should be denied for this reason.

2. Petitioners' Disputes with the Vagueness Analysis of the Opinion below Present No Question That Warrants Granting the Writ.

Petitioners' fifth question presented is whether the phrase "identification sign" as used in N.J.S.A. § 2C:34-7c and as construed by the Supreme Court of New Jersey (affirming the interpretation of the intermediate state-appellate court) is unconstitutionally vague and prevents them from understanding what type of exterior "identification sign" they may post. This fifth question presented is not recurring, is not the subject of conflicting opinions among courts from several jurisdictions (indeed, is the subject of only the opinion below), and is not of general interest or general importance. In disputing the analysis of the opinion below, petitioners are objecting only to (their perceived) misapplication of settled law. Petitioners advance no reason -- and none is apparent -- for which this case presents an appropriate vehicle for re-visiting well-settled law on this subject.

Petitioners err to argue that the phrase "identification sign" is unconstitutionally vague. In the courts below, petitioners mounted a facial, rather than an "as applied" challenge to this statute. (App. to Pet. A-33). But unquestionably, petitioners can conform their conduct (their signage) to the requirements of the statute. There exist signs that, without doubt, are "identification signs" as construed by the opinion below. For most cases, the question whether the signage is proscribed will be readily answerable, and "to the extent that an area of doubt exists, [there is] no reason why the [restrictions] are not 'readily subject to [further] narrowing construction by the state courts.'" Young v. American Mini Theatres Inc, 427 U.S. 50, 61 (1976) (quoting from Erznoznik v. City of Jacksonville, 422 U.S. 205, 216

(1975)). See also City of Renton v. Playtime Theatres, 475 U.S. 41, 55 n.4 (1986).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX TO THE BRIEF OF THE RESPONDENTS IN OPPOSITION

The text of statutes and other provisions involved in this case (other than those quoted in the petition) is as follows:

N.J.S.A. § 2C:33-12.2

a. As used in this act:

(1) "Sexually oriented business" means:

(a) A commercial establishment which as one of its principal business purposes offers for sale, rental, or display any of the following:

Books, magazines, periodicals or other printed material, or photographs, films, motion pictures, video cassettes, slides or other visual representations which depict or describe a "specified sexual activity" or "specified anatomical area"; or still or motion picture machines, projectors or other image- producing devices which show images to one person per machine at any one time, and whether the images so displayed are characterized by the depiction of a "specified sexual activity" or "specified anatomical area"; or instruments, devices, or paraphernalia which are designed for use in connection with a "specified sexual activity"; or

(b) A commercial establishment which regularly features live performances characterized by the exposure of a "specified anatomical area" or by a "specified sexual activity," or which regularly shows films, motion pictures, video cassettes, slides, or other photographic representations which depict or describe a "specified sexual activity" or "specified anatomical area";

(2) "Person" means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(3) "Specified anatomical area" means:

(a) Less than completely and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola; or

(b) Human male genitals in a discernibly turgid state, even if covered.

(4) "Specified sexual activity" means:

(a) The fondling or other erotic touching of covered or uncovered human genitals, pubic region, buttock or female breast; or

(b) Any actual or simulated act of human masturbation, sexual intercourse or deviate sexual intercourse.

b. In addition to any activities proscribed by the provisions of N.J.S. 2C:33-12, a person is guilty of maintaining a nuisance when the person owns or operates a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons.

c. Notwithstanding any other provision of law, a municipality shall have the power to determine restrictions, if any, on the hours of operation of sexually oriented businesses.

d. A person who violates this act is guilty of a crime of the fourth degree.

N.J.S.A. § 2C:34-7

a. Except as provided in a municipal zoning ordinance adopted pursuant to N.J.S. 2C:34-2, no person shall operate a sexually oriented business within 1,000 feet of any existing sexually oriented business, or any church, synagogue, temple or other place of public worship, or any elementary or secondary school or any school bus stop, or any municipal or county playground or place of public resort and recreation, or within 1,000 feet of any area zoned for residential use. This subsection shall not apply to a sexually oriented business already lawfully operating on the effective date of this act where another sexually oriented business, an elementary or secondary school or school bus stop, or any municipal or county playground or place of public resort and recreation is subsequently established within 1,000 feet, or a residential district or residential lot is subsequently established within 1,000 feet.

b. Every sexually oriented business shall be surrounded by a perimeter buffer of at least 50 feet in width with plantings, fence, or other physical divider along the outside of the perimeter sufficient to impede the view of the interior of the premises in which the business is located. The municipality may, by ordinance, require the perimeter buffer to meet additional requirements or standards. This subsection shall not apply to a sexually oriented business already lawfully operating on the effective date of this act.

c. No sexually oriented business shall display more than two exterior signs, consisting of one identification sign and one sign giving notice that the premises are off limits to minors. The identification sign shall be no more than 40 square feet in size.

d. A person who violates this section is guilty of a crime of the fourth degree.

New Jersey Court Rule 2:10-5

The appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review.

New Jersey Court Rule 2:11-6 (as it existed prior to the amendment that became effective September 1, 1998)

(a) Service; Filing; Contents; Argument. Within 10 days after entry of judgment, unless such time is enlarged by court order, a party may apply for reconsideration by serving 2 copies of a motion on counsel for each of the opposing parties and filing 9 copies thereof with the Supreme Court, or 5 copies thereof with the Appellate Division, as appropriate. One filed copy shall be signed by counsel. The motion shall not exceed 25 pages and shall contain a brief statement and argument of the ground relied upon and a certificate of counsel that it is submitted in good faith and not for purposes of delay. An answer shall be filed only if requested by the court, and within 10 days after such request or within such other time as the court fixes therein. The motion will not be argued orally.

(b) Grant of Motion. A motion for reconsideration will be granted only if it is moved by a justice or judge who concurred in the judgment or decision, and a majority of the court so determines. It may be granted in whole or in part, and on terms. Unless otherwise ordered by the court, the motioning party shall be regarded as the appellant on reconsideration and shall file a brief within 30 days of the entry of the order granting the

reconsideration. Thereafter the same procedures shall be followed as are provided for an original appeal.

(c) Determination of Appeal. The court may, where appropriate, summarily redetermine the appeal or amend its opinion.

[Paragraph (a) of this Rule was amended July 10, 1998 to be effective September 1, 1998. The amendment requires that the motion for reconsideration have annexed a copy of the opinion and any separate judgment or order that is the subject of the motion. Petitioners' motion for reconsideration predated the effective date of this amendment, although petitioners' motion complied with the obligation that it had not yet imposed.]